SO ORDERED.

SIGNED this 22nd day of December, 2011.

Janice Miller Karlin
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF KANSAS

In re **Tammie Sims,** **Debtor.**	**Case No. 10-23942** **Chapter 7**
Tammie Sims, **Plaintiff,** **vs.** **American Education Services and United States Department of Education,** **Defendants.**	**Adversary No. 11-6146**

ORDER GRANTING MOTION TO COMPEL

The Court heard argument on the Motion to Compel[1] filed by the United States Department of Education. The Motion seeks a response to two interrogatories, Nos. 24 and 25. Interrogatory 24 seeks information about whether Plaintiff has been convicted

[1] Doc. 47.

of, or plead guilty or nolo contendere to, a crime involving dishonesty or false statements. Interrogatory 25 requests a listing of documents responsive to Request for Production No. 40. Although a copy of that Request for Production was not attached to the motion, counsel for the United States advises that Request No. 40 also deals with the same issue regarding crimes involving dishonesty or false statements.

Plaintiff objected to both on the grounds that they were "not calculated to lead to the discovery of information relevant to the issues raised in Plaintiff/Debtor's Complaint to Determine Dischargeability of Student Loans." In response, the United States properly, pursuant to Fed. R. Bankr. P. 7037, Fed. R. Civ. P. 37(a)(3)(B)(iii), and D. Kan. LBR 7026.1(l), filed this Motion to Compel, after taking the steps required to obtain compliance before bringing the motion.

After hearing argument and doing its own research, the Court finds that the Motion to Compel must be granted. The Committee Notes to the 2000 Amendments to Rule 26(b)(1) of the Federal Rules of Civil Procedure state: "A variety of types of information not directly pertinent to the incident in suit could be relevant to the claims or defenses raised in a given action. . . . [I]nformation that could be used to impeach a likely witness, although not otherwise relevant to the claims or defenses, might be properly discoverable." *See also* 8 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 2015 (3d ed.) ("Discovery is commonly allowed in which the discovering party seeks information with which to impeach witnesses for the opposition. Inquiry is routinely allowed about criminal convictions of a party or witness and similar matters that go to his credibility. Information showing that a person having knowledge of discoverable facts may not be worthy of belief is always relevant to the subject matter

of the action. Rule 26(b)(1) allows discovery even of information inadmissible at the trial if it "appears reasonably calculated to lead to the discovery of admissible evidence." Inconsistent statements, criminal convictions, proof of bias, and similar material, being themselves admissible evidence, cannot be excluded from the scope of discovery.").

In addition, a very recent decision by Magistrate Judge Rushfelt, *Layne Christensen Co. v. Bro-Tech Corp.*,[2] considered the relevance of an interrogatory asking for all criminal convictions of both the entities named in the lawsuit and all the affiliates of those entities. In support of his decision compelling answers, Judge Rushfelt cited cases holding that, not only is criminal history relevant to credibility, but that "all convictions of a party [are] discoverable so that the requesting party may make their own determination as to whether the conviction falls within" Rule 609(a)(2).

Plaintiff is ordered to fully respond to Interrogatories 24 and 25 within five business days, so as to not further delay these proceedings. A pretrial conference is scheduled for January 20, 2012 at 10:00 a.m., and Plaintiff is reminded that it is her responsibility to prepare and file (by January 17) the Pretrial Order in concert with the other party in this case.

The Court also finds that Plaintiff's failure to respond to the interrogatories was unjustified, and caused the United States to incur expenses in seeking compliance, which was withheld by Plaintiff, and in filing this Motion and attending this hearing. Although the Court notes that Plaintiff is *pro se*, it is clear from the pleadings she has filed in this case, and the language she has used in those pleadings, that she is a well-informed and educated *pro se* Plaintiff. A small amount of research (which the

[2] No. 09-2381-JWL-GLR, 2011 WL 4688836, at *2–3 (D. Kan. Oct. 6, 2011).

government basically did for her in trying to informally get her to properly respond to these interrogatories) would have demonstrated her refusal to answer was not justified.

Accordingly the Court will grant the request for an award of attorney fees and expenses. Plaintiff and counsel for the United States shall informally attempt to arrive at an appropriate award, after the United States provides to Plaintiff an itemization of the time spent obtaining this decision (including the attendance at this hearing and the preparation of the itemization) multiplied times a reasonable hourly rate (which this Court assumes is at least $175-$200 per hour, and perhaps more given the level of experience of the Defendant's attorney). The Court will enter an agreed order granting a fee award. If the parties cannot agree on a reasonable award, counsel for the United States shall file his request for the fees/expenses, including the itemization, and the Court will decide the amount of the fee award.

The Court also notes that Plaintiff amended her Complaint on July 15, 2011, naming only American Education Services and the United States Department of Education. ECMC moved to intervene, and that motion was allowed,[3] but that was before Plaintiff amended her complaint.[4] Upon the filing of the amended complaint, ECMC was deleted as a party-defendant, and thus it appeared that ECMC was no longer a party.

But the Court's docket sheet shows participation by ECMC in this case since the

[3] Doc. 7, dated June 6, 2011.

[4] Doc. 22, dated July 15, 2011.

amended complaint was filed.[5] Accordingly, if Plaintiff intends for ECMC to be a party, Plaintiff is ordered to amend her complaint, again, to name ECMC. Alternatively, if ECMC stipulates that it is a party, and that no further service is required, those parties may upload a stipulated order adding ECMC as a party-defendant.

Finally, the Court also notes that Plaintiff sought a default judgment against Defendant American Education Services three days after filing an amended complaint against that entity.[6] The docket sheet does not reflect that the amended complaint was served with a summons on American Education Services. Accordingly, the Motion for Default judgment is denied for failure to serve that entity pursuant to Fed. R. Bankr. P. 7004. The Court orders Plaintiff to immediately serve that defendant with the amended complaint if she believes it is a proper party defendant.

IT IS, THEREFORE, ORDERED, that the Motion to Compel of the United States Department of Education is granted, and reasonable attorney fees and expenses are awarded to the United States for having to file the motion. Plaintiff shall respond fully to the outstanding interrogatories within five business days.

IT IS FURTHER ORDERED that the Motion for Default Judgment against Defendant American Education Services is denied, without prejudice to re-filing once service is properly obtained on that Defendant.

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[5] *See*, *e.g.*, Notice of Service of Rule 26(a)(1) disclosures on July 18, 2011, answer (sua sponte adding its name to the caption) dated August 8 2011 (Doc. 34), response dated August 10, signature on order, Doc. 43, dated October 17, 2011, etc.

[6] Doc. 25.